No. 14-114

IN THE

Supreme Court of the United States

DAVID KING, et al.
Petitioners,

v.

SYLVIA MATHEWS BURWELL, U.S. SECRETARY OF HEALTH AND HUMAN SERVICES, et al.
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* STATE OF INDIANA AND 39 INDIANA PUBLIC SCHOOL CORPORATIONS IN SUPPORT OF PETITIONERS

ANDREW M. MCNEIL
W. JAMES HAMILTON
JOHN Z. HUANG

Bose McKinney & Evans LLP
111 Monument Circle
Suite 2700
Indianapolis, IN 46204
(317) 684-5000
amcneil@boselaw.com

Counsel for Amici Curiae 39 Indiana School Corporations

GREGORY F. ZOELLER
Attorney General of Indiana
THOMAS M. FISHER
Solicitor General of Indiana
(*Counsel of Record*)
HEATHER HAGAN MCVEIGH
LARA LANGENECKERT
Deputy Attorneys General
Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

Counsel for Amicus Curiae State of Indiana

QUESTION PRESENTED

Section 36B of the Internal Revenue Code, which was enacted as part of the Patient Protection and Affordable Care Act ("ACA"), authorizes federal tax-credit subsidies for health insurance coverage that is purchased through an "Exchange established by the State under section 1311" of the ACA.

The question presented is whether the Internal Revenue Service may permissibly promulgate regulations to extend tax-credit subsidies to coverage purchased through Exchanges established by the federal government under section 1321 of the ACA.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF THE *AMICI* STATES 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT 7

I. The Plain Text of Section 36B Precludes the IRS Subsidy Rule 7

A. The ACA "establishes" the parameters of both State and Federal Exchanges but reserves tax credits for Exchanges whose *operation* is "established by the State" 7

1. State means State, not Federal 7

2. "Established" does not imply "established by the State" 10

B. No "absurd results" or "anomalies" arise from the plain text of section 36B 12

II. The Conceit that "State Exchange" Means "Federal Exchange" Raises Troubling Tenth Amendment Issues 18

A. The Federal Government is not a State, and treating it as a State obscures political accountability 20

B. If the Court upholds the IRS Subsidy Rule, federal courts will need to address troubling Tenth Amendment issues and perhaps revisit precedents 23

1. If applicable to States without their consent, the Employer Mandate is a tax that violates the inter-governmental tax immunity doctrine 23

2. Alternatively, the Employer Mandate is invalid as a Commerce Clause regulation of the States 30

CONCLUSION 34

TABLE OF AUTHORITIES

Cases

Bond v. United States,
131 S. Ct. 2355 (2011).....25, 26

Burwell v. Hobby Lobby Stores, Inc.,
134 S. Ct. 2751 (2014).....19

Collector v. Day,
78 U.S. 113 (1870).....26, 27

Dobbins v. Comm'rs of Erie Cnty.,
41 U.S. 435 (1842).....27

Envtl. Def. v. Duke Energy Corp.,
549 U.S. 561 (2007).....10

FERC v. Mississippi,
456 U.S. 742 (1982).....21

Florida ex rel. McCollum v. U.S. Dep't of Health & Human Servs.,
716 F. Supp. 2d 1120 (N.D. Fla. 2010).....23

Garcia v. San Antonio Metro. Transit Auth.,
469 U.S. 528 (1985).....*passim*

Graves v. New York ex rel. O'Keefe,
306 U.S. 466 (1939).....27

Gregory v. Ashcroft,
501 U.S. 452 (1991).....32

Cases [Cont'd]

Helvering v. Gerhardt,
304 U.S. 405 (1938) 27

Indian Motorcycle Co. v. United States,
283 U.S. 570 (1931) 27

Indiana v. I.R.S.,
No. 1:13-CV-1612-WTL-TAB, 2014 WL
3928455 (S.D. Ind. Aug. 12, 2014) 3, 23

King v. Burwell,
759 F.3d 358 (4th Cir. 2014) 19

Maryland v. Wirtz,
392 U.S. 183 (1968) 31

McCulloch v. Maryland,
17 U.S. 316 (1819) 26, 27

Michigan v. Bay Mills Indian Cmty.,
134 S. Ct. 2024 (2014) 17, 18

Nat'l League of Cities v. Usery,
426 U.S. 833 (1976) 31

New York v. United States,
326 U.S. 572 (1946) 28

New York v. United States,
505 U.S. 144 (1992) ..... *passim*

NFIB v. Sebelius,
132 S. Ct. 2566 (2012) ..... *passim*

Cases [Cont'd]

Nixon v. Mo. Mun. League,
541 U.S. 125 (2004).....21

Pollock v. Farmers' Loan & Trust Co.,
157 U.S. 429 (1895).....26, 27, 28

Pollock v. Farmers' Loan & Trust Co.,
158 U.S. 601 (1895).....27

Printz v. United States,
521 U.S. 898 (1997).....6, 33, 34

South Carolina v. Baker,
485 U.S. 505 (1988).....*passim*

Travis v. Reno,
163 F.3d 1000 (7th Cir. 1998).....30

United States v. Balt. & Ohio R.R. Co.,
84 U.S. 322 (1872).....26, 27

United States v. Butler,
297 U.S. 1 (1936).....25

United States v. New Mexico,
455 U.S. 720 (1982).....28

Weston v. City Council of Charleston,
27 U.S. 449 (1829).....26, 27

Federal Statutes

26 U.S.C. § 36B(b)(2)(A) 4, 5, 7

26 U.S.C. § 125(f)(3) 13

26 U.S.C. § 4980H 2, 4

26 U.S.C. § 4980H(a) 2, 24

26 U.S.C. § 4980H(b) 2, 24

26 U.S.C. § 4980H(d) 24

26 U.S.C. § 5000A 4

26 U.S.C. § 6671(a) 24

42 U.S.C. § 300gg-91(d)(21) 10

42 U.S.C. § 405(c)(2)(C)(x) 11

42 U.S.C. § 1396a(gg)(1) 12

42 U.S.C. § 1396w-3(b) 16

42 U.S.C. § 1397ee(d)(3) 16

42 U.S.C. § 18024(d) 7

42 U.S.C. § 18031 4

42 U.S.C. § 18031(b)(1) 8

42 U.S.C. § 18031(d) 16, 20

42 U.S.C. § 18032(a)(1) 15

Federal Statutes [Cont'd]

42 U.S.C. § 18032(f)(1)(A) 15

42 U.S.C. § 18041 4

42 U.S.C. § 18041(c) 8, 17

42 U.S.C. § 18043(a)(1) 8

42 U.S.C. § 18051(e)(2) 11

42 U.S.C. § 18052 14

42 U.S.C. § 18052(a)(3) 14

42 U.S.C. § 18052(b) 14

42 U.S.C. § 18111 10

ACA § 1304(d) 7

ACA § 1311 ..... 4, 8

ACA § 1311(b)(1) 8

ACA § 1311(d) 16, 20

ACA § 1312(a)(1) 15

ACA § 1312(f) 15

ACA § 1321 4

ACA § 1321(c) 8, 17

ACA § 1323(a)(1) 8

Federal Statutes [Cont'd]

ACA § 1331(e)(2) 11

ACA § 1332(a)(3) 14

ACA § 1332(b) 14

ACA § 1401(a) 4, 5

ACA § 1414(a)(2) 11

ACA § 1501 24

ACA § 1501(b) 4

ACA § 1513 4

ACA § 1513(a) 2, 24

ACA § 1515(a) 13

ACA § 1562(b) 10

ACA § 2001(b)(2) 12

ACA § 2101(b)(1) 16

ACA § 2201 16

ACA § 10203(c) 16

HCERA § 1002 4

HCERA § 1003 4

HCERA § 1004(a) 4

Federal Statutes [Cont'd]

HCERA § 1204(a) 8

Health Care & Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029 (2010) 2

Internal Revenue Code § 36B ..... *passim*

Internal Revenue Code § 125(a) 13

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) 2

Pub. L. No. 93-259, 88 Stat. 55 (1974) 31

Federal Rules

Supreme Court Rule 37 1

Federal Regulations

26 C.F.R. § 1.36B 5

26 C.F.R. § 1.36B-1(k) 9

26 C.F.R. § 1.36B-2 5

42 C.F.R. § 435.1200 17

42 C.F.R. § 435.1200(a) 17

45 C.F.R. § 155.20 ..... 5, 9

45 C.F.R. § 155.305(a)(3)(i) 15

Federal Regulations [Cont'd]

76 Fed. Reg. 51201, 51206 (August 17, 2011) 15

77 Fed. Reg. 30,377, 30,378 (May 23, 2012) 5

78 Fed. Reg. 218-01 (Jan. 2, 2013) 2

Federal Constitutional Provisions

U.S. Const. amend. XVI 29

Other Authorities

Aziz Huq, *Bad Law, Smart Politics in Constitutional Challenges to Healthcare Reform*, The Nation (April 15, 2010), http://www.thenation.com/article/bad-law-smart-politics-constitutional-challenges-healthcare-reform 18

Cong. Budget Off., *Table 2: CBO's May 2013 Estimate of the Budgetary Effects of the Insurance Coverage Provisions Contained in the Affordable Care Act* (2013), *available at* http://latham.house.gov/uploadedfiles/cbo-uninsured-never-below-30-mil-under-obamacare.pdf 24

Indiana State Budget Agency, *End-of-Month Revenue Report* (June 30, 2012), *available at* http://www.in.gov/sba/files/revreport_june2012.pdf 29

Other Authorities [Cont'd]

The Individual Responsibility Policy Is Constitutional, U.S. Senate Democrats (March 26, 2010, 8:00AM), http://democrats.senate.gov/2010/03/26/the-individual-responsibility-policy-is-constitutional 18

IRS, *Federal Tax Exemptions for Government Entities*, http://www.irs.gov/Government-Entities/Federal,-State-&-Local-Governments/Fuel-Tax-Exemptions-for-Government-Entities (last visited Dec. 24, 2014) 30

IRS, Publication 15: (Circular E) Employer's Tax Guide 37 (2014), *available at* http://www.irs.gov/pub/irs-pdf/p15.pdf 30

James Taranto, *Gruber vs. Gruber*, Wall St. J. (July 25, 2014), *available at* http://online.wsj.com/articles/best-of-the-web-today-gruber-vs-gruber-1406318853 4

Merriam-Webster's Collegiate Dict. (11th ed. 2004) 10, 11

Maureen Groppe, *Federal Court To Hear Indiana's Challenge to Obamacare*, Indystar.com (Aug. 13, 2014, 6:29PM), http://www.indystar.com/story/news/politics/2014/08/13/federal-court-hear-indianas-challenge-obamacare/14026189/ 3

Other Authorities [Cont'd]

Robert Pear, *Jonathan Gruber of M.I.T. Regrets "Arrogance" on Health Law*, N.Y. Times (Dec. 9, 2014), *available at* http://www.nytimes.com/2014/12/10/us/jonathan-gruber-of-mit-regrets-arrogance-on-health-law.html.....22

STATEMENT OF *AMICI* INTEREST[1]

Distribution of Exchange subsidies triggers liability under section 1513 of the ACA, which requires large employers (meaning those with 50 or

---

[1] Pursuant to Supreme Court Rule 37, this brief is submitted by the State of Indiana and 39 of its public school corporations: Area 30 Career Center Education Interlocal, Benton Community School Corporation, Charles A. Beard Memorial School Corporation, Cloverdale Community School Corporation, Community School Corporation of Eastern Hancock County, Daleville Community Schools, Eastern Howard School Corporation, East Porter County School Corporation, Eminence Community School Corporation, Fayette County School Corporation, Greencastle Community School Corporation, John Glenn School Corporation, Madison Consolidated Schools, Metropolitan School District of Martinsville, Monroe Central School Corporation, Monroe-Gregg School District, Mooresville Consolidated School Corporation, Nettle Creek School Corporation, Northeastern Wayne School Corporation, North Lawrence Community Schools, North Putnam Community School Corporation, Northwestern Consolidated School District of Shelby County, Northwestern School Corporation, North West Hendricks School Corporation, Old National Trail Special Services Cooperative, Perry Central Community Schools, Salem Community Schools, Shelby Eastern School Corporation, Shelbyville Central Schools, South Gibson School Corporation, South Henry School Corporation, South Putnam Community School Corporation, Southwest Parke Community School Corporation, Southwest Jefferson County Consolidated School Corporation, Taylor Community School Corporation, Union School Corporation, Vincennes Community School Corporation, Western School Corporation, and Western Wayne Schools. The parties have filed blanket amicus consents. No counsel for a party authored the brief in whole or in part, no counsel for a party (or party itself) made a monetary contribution intended to fund the preparation or submission of the brief, and no person or counsel other than *amici curiae* made such a monetary contribution.

more employees) to provide minimum essential health insurance coverage to employees working 30 or more hours per week. Patient Protection and Affordable Care Act [hereinafter "ACA"], Pub. L. No. 111-148, § 1513, 124 Stat. 119, 253–256 (2010) (codified as amended by the Health Care & Education Reconciliation Act of 2010, Pub. L. 111-152 § 1003, 124 Stat. 1029, 1033 (2010) [hereinafter "HCERA"], at 26 U.S.C. § 4980H); *see also* 78 Fed. Reg. 218-01 (Jan. 2, 2013) (proposing implementing regulations). Under this "Employer Mandate," if even one such employee is not offered minimum essential coverage and receives an Exchange subsidy, the employer must pay an "assessable payment" or tax penalty of $2,000 for each full-time employee. ACA § 1513(a) (codified at 26 U.S.C. § 4980H(a)–(b)).

The IRS Subsidy Rule at issue in this case authorizes distribution of Exchange subsidies even in States that have not created their own Exchanges. It thereby injures both the State of Indiana and many of its public school corporations by forcing them either to (1) offer minimum essential coverage they cannot afford to previously uncovered employees who work more than 30 hours per week; (2) pay massive ACA Employer Mandate penalties; or (3) restructure their workforces to reduce the number of employees on staff working 30 or more hours per week.

Prior to the enactment of the ACA, Indiana did not offer minimum essential coverage to part-time or intermittent employees working between 29 and 37.5 or more hours per week. But because such

employees would now be classified as "full-time" under the ACA, and because the IRS Subsidy Rule makes tax-credit subsidies available to such full-time employees even in non-Exchange states, Indiana has reduced the hours of several part-time or intermittent employees to avoid a penalty.

Similarly, many Indiana public school corporations have reduced the working hours of instructional aides, substitute teachers, non-certified employees, cafeteria staff, bus drivers, coaches, and leaders of extracurricular activities to fewer than 30 hours per week. *See* Maureen Groppe, *Federal Court To Hear Indiana's Challenge to Obamacare*, Indystar.com (Aug. 13, 2014, 6:29PM), http://www.indystar.com/story/news/politics/2014/08/13/federal-court-hear-indianas-challenge-obamacare/14026189/. Other public school corporations, unable to reduce work hours, now pay thousands to insure newly eligible employees. Am. Compl. at 15–16, 25, 28, 31, 36, *Indiana v. IRS*, No. 1:13-cv-1612-WTL-TAB (S.D. Ind. argued Oct. 9. 2014). Compliance and administrative burdens have been extensive. Some school corporations have installed a $30,000 time management tracking system, limited who can coach or serve in extracurricular activities, and created positions devoted exclusively to tracking hours worked. *Id.* at 11, 16, 31, 36–37.

Owing to these injuries, *amici* have challenged the IRS Subsidy Rule. *Indiana v. I.R.S.*, No. 1:13-CV-1612-WTL-TAB, 2014 WL 3928455 (S.D. Ind. Aug. 12, 2014). This case will directly impact that litigation.

SUMMARY OF THE ARGUMENT

The Affordable Care Act requires most Americans to purchase minimum essential health insurance coverage or pay a tax penalty. ACA § 1501(b) (codified as amended by HCERA §§ 1002, 1004(a), at 26 U.S.C. § 5000A). Congress envisioned that many would purchase coverage through a newly devised, government-operated market clearinghouse called an American Health Benefit Exchange. ACA §§ 1311, 1321 (codified at 42 U.S.C. §§ 18031, 18041). Rather than simply direct an agency of the federal government to assume that burden, however, Congress attempted to induce States to create, operate, and maintain these health benefit Exchanges. It did so in part by offering premium assistance tax credits for purchases on ACA Exchanges "established by the State under [section] 1311 of the [ACA.]" ACA § 1401(a) (codified at 26 U.S.C. § 36B(b)(2)(A)).

Jonathan Gruber, a professor at MIT and an "architect" of the ACA, has explained the logic behind this crass political game as follows: "[I]f you're a state and you don't set up an exchange, that means your citizens don't get their tax credits." James Taranto, *Gruber vs. Gruber*, Wall St. J. (July 25, 2014), *available at* http://online.wsj.com/articles/best-of-the-web-today-gruber-vs-gruber-1406318853 (calling Gruber the "Obamacare architect"). Gruber might have added the other regulatory trade-off: By refusing to create an Exchange, a State could spare its employers the burden of the Employer Mandate. ACA § 1513 (codified as amended by HCERA § 1003, at 26 U.S.C. § 4980H).

Regardless, when most States declined to set up Exchanges, the IRS extended the tax-credit subsidies—and the Employer Mandate—nationwide by defining "Exchange" for purposes of tax-credit subsidies as "a State Exchange, regional Exchange, subsidiary Exchange, and Federally-facilitated Exchange." Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,378 (May 23, 2012) (relevant rule codified at 26 C.F.R. §§ 1.36B-1(k), 1.36B-2); *see also* 45 C.F.R. § 155.20.

This rule is transparently at odds with section 36B and its "established by the State under [section] 1311" condition. ACA § 1401(a) (codified at 26 U.S.C. § 36B(b)(2)(A)). The United States defends this IRS Subsidy Rule either by negating the statutory words "established by the State" or by deeming itself a State agent. It also contends that proceeding otherwise, *i.e.*, according to the plain text of section 36B, would create "anomalies" in other sections of the Act. Yet the design of the ACA confirms the validity of the canon that statutory text is to be given meaning whenever possible, and the so-called anomalies are either purposeful policy choices or ambiguities that have already been resolved by other regulations. Taking "established by the State" at face value implies no collateral consequences so troubling as to justify re-writing the statute by regulatory fiat.

What is more, by presuming to act as the States' unconsented agent, the United States threatens both State autonomy and Congress' statutory bargain. Indiana's choice not to create an Exchange was the result of deliberations by State elected officials who

had the wants and needs of Indiana citizens in mind. It was also an exercise of Indiana's constitutionally guaranteed sovereign authority, which cannot be restricted by unelected federal administrators.

Furthermore, if the Court upholds the IRS Subsidy Rule and consequential application of the Employer Mandate to non-consenting States, it will implicate Intergovernmental Tax Immunity doctrine. Intergovernmental immunity, the core of which remains valid in the wake of *South Carolina v. Baker*, 485 U.S. 505 (1988), is essential to maintaining two governments that are truly sovereign, not only in their distinct spheres, but also in their freedom from control by one another. If applicable to non-consenting States, the Employer Mandate constitutes a direct tax on a co-equal sovereign that transgresses this immunity.

Even if the Employer Mandate is understood as a regulatory measure under the Commerce Clause, any such direct, involuntary regulation of essential State affairs runs counter to the Court's current Tenth Amendment precedents such as *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997). Accordingly, if the IRS Subsidy Rule prevails in this case, it is likely that lower courts, and ultimately this Court, will once again be forced to confront the scope and continuing validity of *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

ARGUMENT

I. The Plain Text of Section 36B Precludes the IRS Subsidy Rule

A. The ACA "establishes" the parameters of both State and Federal Exchanges but reserves tax credits for Exchanges whose *operation* is "established by the State"

Section 36B of the Internal Revenue Code, enacted as part of the ACA, authorizes federal tax-credit subsidies for health insurance coverage purchased through an "Exchange established by the State under [section] 1311" of the ACA. 26 U.S.C. § 36B(b)(2)(A). The validity of the IRS Subsidy Rule—which extends tax-credit subsidies to coverage purchased through Exchanges established by the federal government under section 1321 of the ACA, is belied by the meaning of "State" and "established."

1. State means State, not Federal

The plain meaning of the term "State" includes each of the 50 sovereign States that comprise the United States. In the ACA, Congress did not purport to alter this ordinary understanding, but rather legislated in conformity with it.

To begin, "State" is defined twice in the Act. First, Congress specified the District of Columbia is a "State" for the ACA's purposes. ACA § 1304(d) (codified at 42 U.S.C. § 18024(d)) ("In this title, the term 'State' means each of the 50 States and the District of Columbia."). Second, Congress declared

any territory that establishes an Exchange "in accordance with [ACA § 1311] shall be treated as a State" for the purpose of that section. ACA § 1323(a)(1) (codified as amended by HCERA § 1204(a), at 42 U.S.C. § 18043(a)(1)). Significantly, these definitions make no reference to the federal government at all, let alone do they define it as a "State."

Next, section 1311 directs that "[e]ach *State* shall . . . establish an American Health Benefit Exchange for that State." ACA § 1311(b)(1) (codified at 42 U.S.C. § 18031(b)(1)) (emphasis added). Yet Congress was well aware that this use of "shall" must be permissive rather than mandatory owing to the Tenth Amendment restrictions against commandeering State operations. *See New York v. United States*, 505 U.S. 144, 162 (1992) ("[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."). Accordingly, as a fallback, if a State elects not to establish an Exchange, the Secretary is called upon to "establish and operate such Exchange within the State and . . take such actions as are necessary to implement such other requirements." ACA § 1321(c) (codified at 42 U.S.C. § 18041(c)).

The Secretary contends that this directive implies the power to transmogrify one sovereign into another, so that section 1321(c)'s reference to "such Exchange" makes the federal Exchange equivalent in all respects to the State Exchange for which it is substituting. And if the federal Exchange is equivalent to the State Exchange, the Secretary

reasons, so too the creator of the federal Exchange (the Secretary herself) must be equivalent to the creator of the State Exchange (the State itself). This is a faulty syllogism inconsistent with both the statutory definition and the plain meaning of the term "State," and in effect reads "established by the State" out of section 36(B). If "State" implicitly meant "federal," there would have been no need for section 1321, as section 1311 would have been a directive to the federal government as well.

Finally, the language of the IRS Subsidy Rule itself acknowledges that the ACA's definition of "State" does not include the federal government; it specifies that "Exchange" has "the same meaning as in 45 C.F.R. [§] 155.20." 26 C.F.R. § 1.36B-1(k). That incorporated regulation, a definitional section for ACA regulations, specifically includes all Exchanges "that meet[] the applicable standards . . regardless of whether the Exchange is established and operated by a State . . . *or by HHS*." 45 C.F.R. § 155.20 (emphasis added). In other words, in that separate regulation, the Secretary was keenly aware of the distinction between State and federal Exchanges and specified that HHS regulations apply to both. If the Secretary's theory that a section 1321 Exchange is the same as an Exchange "established by the State under [section] 1311," the phrase "or by HHS" in 45 C.F.R. § 155.20 would be superfluous. Thus, the Secretary's theory amounts to semantic opportunism rather than rigorous textual analysis.

2. "Established" does not imply "established by the State"

To support her theory, the Secretary cites the ACA's definition of "Exchange": "an American Health Benefit Exchange *established* under section 1311 of [the ACA]." ACA § 1562(b) (emphasis added) (codified at 42 U.S.C. § 300gg-91(d)(21)); *see also* 42 U.S.C. § 18111 ("Unless specifically provided for otherwise, the definitions contained in section 300gg-91 of this title shall apply with respect to this title."). The Secretary takes this to mean that an Exchange "established" by the Secretary pursuant to section 1321 is necessarily and always the same thing as an Exchange "established by the State" pursuant to section 1311.

But this interpretation ignores the context of each provision in which "established" is used—and different ways in which an Exchange can be "established" under section 1311. Although courts "presume that the same term has the same meaning when it occurs here and there in a single statute, . most words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section." *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007) (internal quotations omitted).

To be sure, section 1311 *establishes*—that is, "sets up"—what an Exchange is and does, *see* Merriam-Webster's Collegiate Dict. at 427 (11th ed. 2004) (definition 5a of "establish" is "to . . . set up"), regardless whether the Exchange is created by a

State under section 1311 or by the Secretary under section 1321. But "establishing" an Exchange can also refer to the act of creating: when a State or the Secretary "establishes" an Exchange, it "brings it about," or brings it into existence. *See id.* (definitions 4a and 4b of "establish" are to "bring into existence; found," and to "bring about; effect"). The Exchange "established" by the Secretary is thus "established" (*i.e.*, set up or defined) under section 1311, and simultaneously "established" (*i.e.*, "brought about" or created) under section 1321.

Through the phrase "by the State," Congress indicated that "established" as used in section 36B has the second meaning. In contrast, other sections of the Act say only "an Exchange established under section 1311," omitting the reference to the creating entity. *See, e.g.*, ACA §§ 1331(e)(2), 1414(a)(2) (codified at 42 U.S.C. §§ 18051(e)(2) and 405(c)(2)(C)(x)). Where Congress intended to distinguish between Exchanges according to the establishing sovereign, it added the phrase "by the State." Thus, section 36B intentionally limits subsidies to Exchanges created by a State and *excludes* Exchanges created by HHS. This contextual reading of "established" both harmonizes the relevant portions of the ACA and avoids the Secretary's constitutionally impossible notion that the federal government is the same as one of the 50 States.

B. No "absurd results" or "anomalies" arise from the plain text of section 36B

The Secretary contends a plain-language reading of "established by the State" creates several anomalies elsewhere in the ACA. But most of those purported anomalies are simply policy choices the Secretary finds disagreeable. Others, the Secretary has already addressed by regulation. Regardless, it is up to Congress rather than this Court to rectify any statutory "anomalies."

1. First, the Secretary cites the so-called Medicaid maintenance-of-effort anomaly. Section 2001 of the ACA says that until a State establishes an Exchange, it cannot add any "eligibility standards, methodologies, or procedures" to its Medicaid plan that are more restrictive than the standards it had in place when the ACA was enacted. ACA § 2001(b)(2) (codified at 42 U.S.C. § 1396a(gg)(1)). Thus, from a textual perspective, a State cannot tighten its Medicaid requirements unless it establishes its own Exchange.

The Secretary argues Congress could not have intended that result, but principles of cooperative federalism indicate otherwise. The success of this statutory scheme depends upon States choosing to establish and run Exchanges; thus, Congress created various incentives and consequences to induce the States to act. Section 2001 is one of them; if a State chooses not to establish an Exchange, it sacrifices its authority to tighten its Medicaid requirements. That is a consequence, not an anomaly.

2. Next, the Secretary claims there is a "cafeteria plan" anomaly. Section 125(a) of the Internal Revenue Code excludes certain amounts spent on cafeteria plans from a taxpayer's gross income. Section 1515(a) of the ACA provides that this exclusion does not apply to any qualified health plan "offered through an Exchange established under section 1311 of [the ACA]." ACA § 1515(a) (codified at 26 U.S.C. § 125(f)(3)). The Secretary claims that applying section 36B as written would make cafeteria plan payments excludable only when the taxpayer's State has an Exchange.

This argument ignores the critical textual difference between sections 36B and 125(f)(3). Section 125(f)(3) refers only to an "Exchange established under section 1311," not an "Exchange established by the State under section 1311." By omitting the phrase "by the State," Congress indicated section 125(f)(3) applies to both a federal Exchange under section 1321 and State Exchanges under section 1311. The cafeteria exclusion therefore does not depend upon which sovereign physically establishes the Exchange.

The premium assistance subsidy, by contrast, is expressly dependent on that distinction, but Congress' policy choice to limit the availability of the subsidy to participants in State Exchanges does not render section 125(f)(3) anomalous.

3. The Secretary claims that not applying the Employer Mandate to States that do not establish their own Exchange would render meaningless the

"State innovation waiver" in section 1332 of the ACA (codified at 42 U.S.C. § 18052). Not so.

The ACA gives States three options: they can (1) create an Exchange under section 1311, (2) elect not to create an Exchange, in which case the Secretary creates an Exchange under section 1321; or (3) pass a law meeting the requirements of section 1332—essentially creating a single-payer system within the State—and obtain a waiver from the Secretary. If a State chooses the third option, the Secretary does not create and operate an Exchange within that State, and the State becomes eligible for a block grant from the Secretary in the amount "that would have been paid on behalf of participants in the Exchanges" in the form of tax credits or cost sharing reductions had the State chosen to operate the Exchange. ACA § 1332(a)(3) (codified at 42 U.S.C. § 18052(a)(3)). The State must use that block grant to implement its alternative coverage program, *id.*, which need not comply with Exchange requirements, *id.* at § 1332(b) (codified at 42 U.S.C. § 18052(b)).

States that neither establish an Exchange nor meet waiver requirements are ineligible for the block grant. The section 1332 waiver provision is thus perfectly consistent with limiting the section 36B premium assistance subsidies to section 1311 State Exchanges.

4. The Secretary has already addressed the final two alleged anomalies by rule. The first of these is the section 1312 residency requirement, relating to a provision stating a "qualified individual may enroll in any qualified health plan available to such

individual and for which such individual is eligible." ACA § 1312(a)(1) (codified at 42 U.S.C. § 18032(a)(1)). A "qualified individual" is "an individual who[] (i) is seeking to enroll in a qualified health plan in the individual market offered through the Exchange; and (ii) resides in the State that established the Exchange . " *Id.* § 1312(f)(1)(A) (codified at 42 U.S.C. § 18032(f)(1)(A)). The Secretary argues a plain reading of "established by the State" in section 36B means that no resident of a state with a federal Exchange can be a qualified individual under section 1312.

But the Secretary has already promulgated a regulation stating "the service area of the Exchange of the individual is the service areas of the Exchange in which he or she is living . ." 45 C.F.R. § 155.305(a)(3)(i). The preamble to the proposed version of this rule makes the residency requirement explicit: "When discussing the residency standard [from ACA § 1312(f)]," it says, "we use the term 'service area of the Exchange' to account for regional or subsidiary Exchanges . as well as for situations in which a Federally-facilitated Exchange is operating in a State. We clarify that this residency standard is designed to apply to all Exchanges . ." 76 Fed. Reg. 51201, 51206 (August 17, 2011). That is, the Secretary used her statutory authority to implement the residency requirement in the federal Exchanges. There is no anomaly.

The second of these final anomalies, the purported CHIP anomaly, relates to coverage for children. Under the ACA, States must "establish procedures to ensure that [Medicaid-eligible]

children are enrolled in a qualified health plan that has been certified by the Secretary [as having benefits that are at least comparable to the State child health plan] and is offered through an Exchange established by the State under section [1311]" of the ACA. ACA §§ 2101(b)(1), 10203(c) (codified at 42 U.S.C. § 1397ee(d)(3)(B), (C)). States must also, as a condition of continued participation in Medicaid, ensure coordination between their Medicaid and CHIP programs and "an Exchange established by the State under section [1311]" of the ACA. ACA § 2201 (codified at 42 U.S.C. § 1396w-3(b)).

The Secretary asserts that, unless "State" means "federal," this requirement cannot be satisfied if the federal government establishes the Exchange, and children in states with federal Exchanges would be at risk of falling into a coverage gap. But current CHIP provisions ensure children are covered either by the State children's health plan or a plan offered through an Exchange established by the State under section 1311. *Compare* ACA § 1311(d)(4)(F) (codified at 42 U.S.C. § 18031(d)(4)(F)) (stating an Exchange shall "at a minimum" inform individuals of eligibility requirements for, and if appropriate enroll individuals in, the CHIP program), *with* ACA §§ 2101(b)(1), 10203(c)(2)(C) (codified at 42 U.S.C. § 1397ee(d)(3)(B), (C)) (requiring the Secretary to establish procedures to ensure eligible children are enrolled in appropriate Medicaid health plan).

In any event, section 1321 authorizes the Secretary to regulate all Exchange requirements, including the CHIP requirements, through the

federal Exchange. The Secretary has done so: in 42 C.F.R. § 435.1200, the Secretary outlines the requirements "to ensure coordinated eligibility and enrollment among insurance affordability programs." *Id.* at § 435.1200(a). Under this regulation, if a State established the Exchange, it must coordinate the benefits available on the Exchange with the CHIP program. If the federal government established the Exchange, the Secretary "shall take such actions as are necessary to implement" these requirements of the Exchange. ACA § 1321(c)(1) (codified at 42 U.S.C. § 18041(c)(1)).

5. Finally, even if the statute does contain some minor anomalies, there is no need for this Court to revise it by judicial fiat. In *Michigan v. Bay Mills Indian Cmty.*, the Court admonished that it "does not revise legislation . . just because the text as written creates an apparent anomaly as to some subject it does not address." 134 S. Ct. 2024, 2033 (2014). Observing a legislative reality, the Court recognized that "such anomalies often arise from statutes, if for no other reason than that Congress typically legislates by parts—addressing one thing without examining all others that might merit comparable treatment." *Id.* Courts have "no roving license, in even ordinary cases of statutory interpretation, to disregard clear language simply on the view that Congress 'must have intended' something broader." *Id.* at 2034.

And just so here: apparent anomalies in ACA provisions unrelated to premium assistance subsidies cannot transform the Secretary into "the

State" for Exchange purposes. "Congress wrote the statute it wrote." *Id.* at 2033–34 (internal quotations omitted). Premium assistance subsidies are limited to plans enrolled in through an "Exchange established by the State under section 1311" of the ACA, and the ACA goes no further.

II. The Conceit that "State Exchange" Means "Federal Exchange" Raises Troubling Tenth Amendment Issues

By now the ACA is infamous for generating unintended consequences and encountering unexpected legal barriers. Multiple challenges to the Individual Mandate went from "frivolous" to grave when the Court upheld that critical leg of the Act based only on Congress' taxing power, not its Commerce Clause power. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2595 (2012).[2] More consequentially, States' Tenth Amendment challenges to the ACA's Medicaid expansion went from "highly speculative and doctrinally out-to-sea," to perfectly grounded when seven members of the Court agreed the expansion was coercive. *Id.* at 2606–07 (opinion of Roberts, C.J., joined by Breyer and Kagan, JJ.); *id.* at 2662 (Scalia, Kennedy, Thomas, and Alito, JJ.,

---

[2] *The Individual Responsibility Policy Is Constitutional*, U.S. Senate Democrats (March 26, 2010, 8:00AM), http://democrats.senate.gov/2010/03/26/the-individual-responsibility-policy-is-constitutional (calling constitutional challenges to the individual mandate "frivolous").

dissenting).[3] And the Secretary's ACA enforcement policies hit an unexpected barrier when this Court held the contraception mandate could not be enforced against religious employers in light of the Religious Freedom Restoration Act. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759–60 (2014).

Now, federal agency overreach jeopardizes *another* critical ACA substructure, the Employer Mandate.

The Secretary contends that the reference to "such Exchange" in section 1321 necessarily incorporates all properties of State Exchanges under section 1311 into federal Exchanges under section 1321. The Fourth Circuit accepted this theory, stating that "it makes sense to read section 1321(c)'s directive that HHS establish 'such Exchange' to mean that the federal government acts on behalf of the state when it establishes its own Exchange." *King v. Burwell*, 759 F.3d 358, 369 (4th Cir. 2014), *cert. granted*, 135 S. Ct. 475 (2014) (No. 14-114). This agency theory is incomprehensible under any reasonable under-standing of federalism and once again calls the ACA into question under the Tenth Amendment.

---

[3] Aziz Huq, *Bad Law, Smart Politics in Constitutional Challenges to Healthcare Reform*, The Nation (April 15, 2010), http://www.thenation.com/article/bad-law-smart-politics-constitutional-challenges-healthcare-reform (criticizing legal challenges to the Medicaid expansion).

A. The Federal Government is not a State, and treating it as a State obscures political accountability

The plain text of the ACA makes it impossible for an Exchange established by the Secretary under section 1321 ever to be considered an Exchange "established by the State under [section] 1311[.]" In order for such a thing to be possible, the federal government would have to form "a governmental agency or nonprofit entity that is established by a State." ACA § 1311(d)(1) (codified at 42 U.S.C. § 18031(d)(1)). But the federal government cannot create a State agency, enact a State statute, or take any other actions necessary to support the fiction that an Exchange established by the Secretary under section 1321 is an Exchange "established by the State under [section] 1311." Congress may not "commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *New York v. United States*, 505 U.S. 144, 161 (1992) (internal quotations omitted); *see also id.* at 162 ("[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."). Indeed, "even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *Id.* at 166.

Nor may Congress supplant the states: "In our federal system, the States have a major role that cannot be pre-empted by the National Government." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S.

528, 568 (1985); *see also id.* at 581 (O'Connor, J., dissenting) ("The true 'essence' of federalism is that the States *as States* have legitimate interests which the National Government is bound to respect even though its laws are supreme."). As the Court has declared, there is a "working assumption that federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power . . . ." *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004).

This is true in part because "[w]here Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people. By contrast, where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished." *New York*, 505 U.S. at 168. Indeed, "[p]ermitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system." *NFIB*, 132 S. Ct. at 2602; *see also FERC v. Mississippi*, 456 U.S. 742, 787 (1982) (O'Connor, J., concurring in judgment in part and dissenting in part) ("Congressional compulsion of state agencies, unlike pre-emption, blurs the lines of political accountability and leaves citizens feeling that their representatives are no longer responsive to local needs.").

State decisions not to establish Exchanges demonstrate the importance of such electoral

accountability. Certainly Governors and legislatures could reasonably conclude any benefit the Exchange might provide would be more than offset by the detrimental effect of subjecting all employers in the State, including local governments and the State itself, to the Employer Mandate. Yet now the IRS Subsidy Rule has undermined the balance of competing interests achieved by the very officials who are accountable to the voters of their separate states. And the Secretary's position that the federal government functions as the State's agent for purposes of operating the Exchange only compounds the accountability problem and transgresses the sovereign boundaries the Court deemed so important in *New York* and *Printz*.

Professor Gruber once proclaimed that, with the ACA, "lack of transparency is a huge political advantage." Robert Pear, *Jonathan Gruber of M.I.T. Regrets "Arrogance" on Health Law*, N.Y. Times (Dec. 9, 2014), *available at* http://www.nytimes.com/2014/12/10/us/jonathan-gruber-of-mit-regrets-arrogance-on-health-law.html (quoting October 2013 video). The IRS Subsidy Rule abets this warped vision of American democracy, not least by blurring the lines between sovereigns. The Court should not tolerate it.

B. If the Court upholds the IRS Subsidy Rule, federal courts will need to address troubling Tenth Amendment issues and perhaps revisit precedents

Even beyond IRS's unilateral assumption of State agency status, its interpretation of "Exchange established by a state," if adopted by this Court, would carry significant Tenth Amendment implications that would eventually need to be addressed.[4]

1. If applicable to States without their consent, the Employer Mandate is a tax that violates the inter-governmental tax immunity doctrine

To the extent it would apply to a State without its consent, the Employer Mandate of ACA section 1513 would violate the Tenth Amendment.

Critically, in *NFIB*, the Court deemed the Individual Mandate a tax. *NFIB*, 132 S. Ct. at 2600. The Court found that when a penalty (1) must be "paid into the Treasury by taxpayers when they file

---

[4] Indiana and its co-Plaintiff Public School Corporations have raised these arguments in their own case, and while the district court has ruled that the State itself is precluded from asserting Tenth Amendment challenges to the Employer Mandate (based on the State's participation in *Florida ex rel. McCollum v. U.S. Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1153–54 (N.D. Fla. 2010)), it has not ruled that the Schools—who were not party to the *Florida* case—are precluded from asserting these claims. *Indiana v. I.R.S.*, No. 1:13-CV-1612, 2014 WL 3928455, at *7–12 (S.D. Ind. Aug. 12, 2014).

their tax returns," (2) is "found in the Internal Revenue Code and [(3)] enforced by the IRS," (4) is "assess[ed] and collect[ed] . . . in the same manner as taxes," and (5) "produces at least some revenue for the Government," it is a tax. *Id.* at 2594. That is, where these factors are met, a requirement can still be a tax even if its "most natural interpretation" is as a Commerce Clause provision, including labeling the exaction a "penalty" instead of a "tax." *Id.* at 2594–95.

The Employer Mandate operates in much the same way as the Individual Mandate and therefore is also a tax. Employers against whom the tax payments are assessed pay it to the Treasury via corporate tax returns. *See* ACA § 1513(a) (codified at 26 U.S.C. § 4980H(d)); *see also* 26 U.S.C. § 6671(a). The Employer Mandate is codified in the Internal Revenue Code and enforced by the IRS. 26 U.S.C. § 4980H(a)–(b). The penalty is assessed and collected in the same manner as a tax, and is estimated to raise $140 billion over ten years.[5]

Statutory context reinforces the idea that the Employer Mandate is a tax. In Title I of the Act, Subtitle F is titled "Shared Responsibility for Health Care." ACA §§ 1501 *et seq.*, 124 Stat. 119, 121. Part I is "Individual Responsibility," and Part II is

---

[5] *See* Cong. Budget Off., *Table 2: CBO's May 2013 Estimate of the Budgetary Effects of the Insurance Coverage Provisions Contained in the Affordable Care Act* (2013), *available at* http://latham.house.gov/uploadedfiles/cbo-uninsured-never-below-30-mil-under-obamacare.pdf.

"Employer Responsibilities." *Id.* The key section in Part I is the Individual Mandate in section 1501, and the key section in Part II is the Employer Mandate in section 1513. They are functional counterparts, designed to work in concert under the same governing principles. The Supreme Court upheld the shared responsibility payment of the Individual Mandate as a tax. *NFIB*, 132 S. Ct. at 2600. So too regarding the Employer Mandate, "the shared responsibility payment may for constitutional purposes be considered a tax, not a penalty[.]" *Id.* at 2595.

But this raises a constitutional problem. If the federal government had plenary taxing power over the States, it could control the States, in contravention of the Plan of the 1787 Constitutional Convention and the Tenth Amendment. *See United States v. Butler*, 297 U.S. 1, 74–78 (1936) (explaining that "[t]he expressions of the framers of the Constitution . . . will be searched in vain for any suggestion that they nevertheless by [the tax] clause gave power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people"). Consequently, the intergovernmental tax immunity doctrine bars Congress from upending the federal balance by subjugating the States through taxation. Yet, if the Employer Mandate is a tax and applies even to non-electing states, it constitutes a direct tax in violation of the intergovernmental tax immunity doctrine.

"The Framers concluded that allocation of powers between the National Government and the

States enhances freedom, first by protecting the integrity of the governments themselves . . . ." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). Thus, "the federal structure serves to grant and delimit the prerogatives and responsibilities of the States and the National Government vis-à-vis one another." *Id.* Indeed, "[t]he allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States. The federal balance is, in part, an end in itself, to ensure that States function as political entities in their own right." *Id.*

That allocation and balance would be fundamentally upended if the power of the federal government to tax a State was coextensive with federal power over corporations. Thus, the Court has long recognized that the doctrine of intergovernmental tax immunity—a doctrine originally applied to the federal government and "aris[ing] from the Supremacy Clause," *South Carolina v. Baker*, 485 U.S. 505, 518 n.11 (1988); *see also McCulloch v. Maryland*, 17 U.S. 316, 436–37 (1819); *Weston v. City Council of Charleston*, 27 U.S. 449, 466 (1829)—also applies to the governments of the States and "arises from the constitutional structure and a concern for protecting state sovereignty." *Baker*, 485 U.S. at 518 n.11; *see also Collector v. Day*, 78 U.S. 113, 125 (1870); *United States v. Balt. & Ohio R.R. Co.*, 84 U.S. 322, 327–28 (1872).

The Court announced the doctrine in *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 584 (1895) (abrogated in part on other grounds): "As the states cannot tax the powers, the operations, or the

property of the United States, nor the means which they employ to carry their powers into execution, so . . . the United States have no power under the constitution to tax either the instrumentalities or the property of a state." *See also Indian Motorcycle Co. v. United States*, 283 U.S. 570, 577 (1931) ("[U]nder the implications of the Constitution the governmental agencies and operations of the states have the same immunity from federal taxation that like agencies and operations of the United States have from taxation by the states.").

Until the New Deal era, the Court applied this doctrine rigidly. On the theory that even indirect taxation on another level of government was impermissible because "the power to tax involves the power to destroy," *McCulloch*, 17 U.S. at 431, the Court overturned the application of a number of generally applicable taxes between the two levels of government. *See, e.g., Weston*, 27 U.S. at 466-67 (exempting federal stock from State tax); *Balt. & Ohio R.R. Co.*, 84 U.S. at 334 & n.15 (exempting municipal bonds from federal tax); *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895) (exempting State bonds from federal tax); *see also Dobbins v. Comm'rs of Erie Cnty.*, 41 U.S. 435, 449-50 (1842) (exempting federal employees from State income tax); *Day*, 78 U.S. at 124 (exempting State employees from federal income tax).

By the 1930s, however, the Court narrowed the application of the doctrine from its formerly expansive application. *See e.g., Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 492 (1939) (overruling *Dobbins*); *Helvering v. Gerhardt*, 304 U.S. 405, 424

(1938) (overruling *Day*). Instead, as it later articulated, the doctrine of tax immunity is only appropriate where the tax is *directly* imposed on the other level of government. In *New York v. United States*, 326 U.S. 572 (1946), the Court, upholding a federal tax on the sale of mineral waters by the State of New York, took an early step in this direction. While two justices concluded that any generally applicable tax could be applied to the States, *see id.* at 583-84 (opinion of Frankfurter, J., announcing the judgment of the Court), four justices reasoned that constitutional concerns necessitated "consider[ation] [as to] whether such a non-discriminatory tax unduly interferes with the performance of the State's functions of government" whenever "the subject of taxation is State property or a State activity." *Id.* at 588 (Stone, C.J., concurring).

In *United States v. New Mexico*, the Court held that federal immunity from State tax "is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." 455 U.S. 720, 735 (1982). Likewise, the Court in *Baker*, 485 U.S. 505, while overruling *Pollock* by rejecting immunity against federal taxation of interest on State bonds, held that just as "the States can never tax the United States directly[,] . . . [t]he rule with respect to

state tax immunity is essentially the same . . ." *Id.* at 523 (citations omitted).[6]

The Employer Mandate's tax penalty—if applicable without a State's consent—is a direct tax on the State and its political subdivisions. It applies to each State entity *directly* as an employer, not indirectly as an excise tax on goods or a payroll tax on employees. It forces each State either to pay the tax or to engage in Congress' desired behavior. Such a direct tax would plainly be unconstitutional if Indiana levied it on the United States, so it is hard to understand how it could be constitutional when roles are reversed.

By exercising such direct taxing authority over States, Congress could cripple its co-equal sovereigns. For example, the federal government is authorized to tax all "incomes," not merely profits. U.S. Const. amend. XVI. If instead of taxing business profits Congress afforded every employer a $1 billion exemption, then imposed a 10% tax on all remaining revenue, it would subject Indiana to a tax of $1.31 billion per year payable to the U.S.

---

[6] The Court in *Baker* referenced the varying opinions in *New York v. United States*, 326 U.S. 572 (1946), regarding the possibility that "at least some nondiscriminatory federal taxes can be collected directly from the States." *Baker*, 485 U.S. at 523 & n.14. Yet it explicitly declined to "decide the extent to which States are currently immune from nondiscriminatory federal taxation," noting that "[i]t is enough for our purposes that federal and state tax immunity cases have always shared the identical methodology for determining whether a tax is 'on' a government . . . ." *Id.*

Treasury.[7] Such a massive nondiscriminatory tax—no less direct merely because triggered by a State's status as employer—would hobble the State and surely be unconstitutional. *See Baker*, 485 U.S. at 523–24; *Travis v. Reno*, 163 F.3d 1000, 1003 (7th Cir. 1998).

In view of such concerns, many provisions of federal law recognize that the Tenth Amendment immunizes the States from direct federal taxation. State and local government employees are exempt from the Federal Unemployment Tax Act. *See* IRS, Publication 15: (Circular E) Employer's Tax Guide 37 (2014), *available at* http://www.irs.gov/pub/irs-pdf/p15.pdf. And vehicle fuel purchases by States and their subdivisions are exempt from federal excise tax. *See* IRS, *Federal Tax Exemptions for Government Entities*, http://www.irs.gov/Government-Entities/Federal,-State-&-Local-Governments/Fuel-Tax-Exemptions-for-Government-Entities (last visited Dec. 24, 2014).

Such laws reflect co-sovereign respect demanded by the Constitution—respect that would be eroded by a ruling in favor of the IRS Subsidy Rule. In that event, federal courts will be called upon to address the application of intergovernmental tax immunity to this situation.

---

[7] The State of Indiana took in $14.1 billion for Fiscal Year 2012. *See* Indiana State Budget Agency, *End-of-Month Revenue Report* (June 30, 2012), *available at* http://www.in.gov/sba/files/revreport_june2012.pdf.

2. Alternatively, the Employer Mandate is invalid as a Commerce Clause regulation of the States

A ruling IRS Subsidy Rule might even force federal courts to revisit *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). For most of this Nation's history, the federal government adhered to a broad, longstanding conception of inter-governmental immunity and did not impose employment laws upon the States. Yet in 1961, then again in 1966, Congress extended provisions of the Fair Labor Standards Act, to State employees. The Court upheld this extension in *Maryland v. Wirtz*, 392 U.S. 183, 198–99 (1968), *overruled by Nat'l League of Cities v. Usery*, 426 U.S. 833, 855 (1976). In dissent, Justice Douglas expressed his concern that with this new power "the National Government could devour the essentials of state sovereignty[.]" *Wirtz*, 392 U.S. at 205 (Douglas, J., dissenting, joined by Stewart, J.).

Congress advanced its incursion upon the States in 1974, expanding the definition of "employer" in FLSA to include "a public agency." Pub. L. No. 93-259, 88 Stat. 55, 58 (1974) (codified at 29 U.S.C. § 203(d)). When the Court reviewed this expansion in *National League of Cities*, it overruled *Wirtz*, and invalidated the FLSA's regulation of "public agenc[ies]." *National League of Cities*, 426 U.S. at 840, 851–52, 855. In so doing, the Court held that "the States as States stand on a quite different footing from an individual or a corporation when challenging the exercise of Congress' power to regulate commerce." *Id.* at 854. The Court held that

the federal government cannot override the functioning of a sovereign State or its subdivisions with regard to its "traditional governmental functions." *Id.* at 849–52.

In *Garcia*, the Court reversed course again, upholding in a 5-4 decision Congress' application of FLSA wage and hour provisions to public employees. *Garcia*, 469 U.S. at 557. The Court held that the Tenth Amendment merely declared a principle to be considered by political actors, not a foundation for court judgments: "State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Id.* at 552.

Even then, however, *Garcia* included the caveat that "we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position." *Id.* at 556. The Court thus left open the possibility that courts could recognize and judicially enforce some limits where federal power interferes with the States, cabining its holding by saying the matters before it "do not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause." *Id.* (citation omitted).

The Court quickly acknowledged its error in declaring that the Tenth Amendment was not a matter for judicial enforcement. *See Gregory v.*

Ashcroft, 501 U.S. 452, 457–64 (1991). "[T]he States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.* at 461. It recognized the indispensable role that the Tenth Amendment plays in maintaining the "healthy balance of power between the States and the Federal Government . . . ." *Id.* at 458.

Two years later, the Court demonstrated its abandonment of *Garcia*'s central premise, invalidating the take-title provision of a federal radioactive-waste statute in *New York v. United States*, 505 U.S. 144, 174–77 (1992). The Court unequivocally rejected the idea that the Tenth Amendment was not a matter for judicial determination, holding that the invalid provision violated the Tenth Amendment's guarantee that the federal government cannot commandeer State legislatures to pass specific legislation. *Id.* at 161. In doing so, the Court cited precedents from the *National League of Cities* line of cases, *see id.* at 160–62, reviving aspects of that doctrine. Specifically, "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *Id.* at 162 (citation omitted).

The Court elaborated upon the Tenth Amendment's protection of States' autonomy in *Printz v. United States*, 521 U.S. 898 (1997). The federal government claimed broad powers to require state-level implementation of a federal statute (there, background check provisions of the Brady Act). *See Printz*, 521 U.S. at 902–05. But the Court

reaffirmed that the Constitution does not allow Congress to regulate States. *Id.* at 920 (quoting *New York*, 505 U.S. at 166). It specifically rejected the argument that "Congress [may] command state or local officials to assist in the implementation of federal law . . ." *Id.* at 927. Rather, "[i]t is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority." *Id.* at 928; *see also NFIB*, 132 S. Ct. at 2602 (opinion of Roberts, C.J., joined by Breyer and Kagan, JJ) (reaffirming that federal courts are "to strike down federal legislation that commandeers a State's legislative or administrative apparatus for federal purposes.")

The IRS Subsidy Rule makes the Employer Mandate involuntary as to States. That regulatory model depends on the continuing vitality of *Garcia*, which cannot be reconciled with the Court's more recent Tenth Amendment decisions. Accordingly, if the Court upholds the IRS Subsidy Rule, federal courts will again be asked to revisit *Garcia*.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

ANDREW M. MCNEIL
W. JAMES HAMILTON
JOHN Z. HUANG

Bose McKinney & Evans LLP
111 Monument Circle
Suite 2700
Indianapolis, IN 46204
(317) 684-5000
amcneil@boselaw.com

GREGORY F. ZOELLER
Attorney General of Indiana
THOMAS M. FISHER
Solicitor General
(Counsel of Record)
HEATHER HAGAN MCVEIGH
LARA LANGENECKERT
Deputy Attorneys General

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov